

**A American International Assurance Bhd v Coordinated Services
L Design Sdn Bhd**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02-(IM)(NCC)-766 OF 2010
ZAINUN ALI, RAMLY ALI AND KANG HWEE GEE JJCA
23 JUNE 2010

C *Companies and Corporations — Winding up — Stay of winding up order — Effect
of stay order — Whether court could grant perpetual stay of winding up order —
Whether stay order could validate all agreements entered into by respondent from
date of winding up order till date of the stay order — Whether stay order in breach
of and ultra vires s 243(1) of the Companies Act 1965 — Whether stay order should
be set aside — Companies Act 1965 ss 243(1) & 223*

D *Insurance — Fire insurance — Claim on policy — Policy taken by directors of
respondent company after respondent was wound up — Whether policy was valid
— Whether policy taken for benefit of company and should be validated*

E When a fire occurred at the respondent's premises, it made a claim under the commercial fire insurance policy (the policy) it had obtained from the appellant, a licensed insurance company. During the investigation of the respondent's claim it was discovered that the respondent had been wound up at the time it had obtained the policy and that the policy was taken by the director of the respondent company and not the liquidator. The appellant thus repudiated its liability under the policy on the grounds that the directors of the respondent had no power to enter into a fire insurance policy with the appellant after the respondent had been wound up, and attempted to refund the insurance premiums paid by the respondent under the policy. The respondent refused to accept the refund and instead filed a notice of motion to stay the winding up order permanently (the stay order) and to validate all dealings and agreements entered into by the respondent from the date of the winding up order till the date of the stay order. When the respondent obtained the stay order, it served the same on the appellant. In response the appellant filed an originating summons seeking, inter alia, a declaration that the stay order was obtained in breach of s 243(1) of the Companies Act 1965 (the Act) and for an order that the stay order be set aside. The High Court judge dismissed this application and hence the instant appeal. The appellant claimed that it should have been given notice of the respondent's intention to apply for a stay order as such an order affected the policy and the position taken by the appellant to repudiate it. The appellant further submitted that the stay order should be set aside as it was in breach of and ultra vires s 243(1) of the Act and

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beyond the jurisdiction of the winding up court. The High Court judge held that the act of taking the policy by the respondent company or its directors after the company was wound up was for the benefit of the company and therefore should be validated.

Held, allowing the appeal with costs:

- (1) The effect of a stay order under s 243 of the Act was not to wipe out the winding up order but to render it inoperative from the date when it was granted. In the present case, the stay order had two limbs, in that, it was a perpetual order to stay altogether the winding up order (the first limb); and it was a validation order to validate all dealings and arrangements entered into by the company from the date of the winding up order until the date of the stay order (the second limb). This court could not agree with the High Court judge on the second limb of the stay order, which was not based on any provision of law. The High Court judge had acted in excess of his powers and jurisdiction of the winding up court when he made the second limb of the stay order. Although it may be argued that in granting the stay order under s 243(1) of the Act the court may impose such terms and conditions as it thinks fit, the term or condition imposed should not defeat the purpose of the order itself. In the present case, the respondent through the second limb of the stay order validated the policy which was void because it was not obtained by the liquidator, but by the directors who had become functus officio once the respondent company was wound up. This was clearly not what s 243 envisaged. Thus, although the High Court judge had the necessary powers under s 243 of the Act to grant a perpetual stay of the winding up order (the first limb), he did not have the power to validate all dealings and agreements entered into by the respondent company from the date of the winding up order until the date of the stay order (the second limb). As such, the second limb of the stay order had to be set aside (see paras 19, 20(a), (b), 22, 25, 31, 33, 38 & 41–42).
- (2) The second limb was also ambiguous, too wide and too general (see para 29).
- (3) The court could not agree with the respondent company that the second limb of the stay order was valid as it was made under s 223 of the Act and O 92 of the RHC 1980. It was held that s 223 was totally not applicable to the facts of the present case (see paras 39–40).

[Bahasa Malaysia summary]

Apabila kebakaran berlaku di premis responden, ia membuat tuntutan di bawah polisi insurans kebakaran komersial ('polisi') yang telah diperolehi daripada perayu, sebuah syarikat insurans berlesen. Semasa penyiasatan tuntutan, didapati bahawa responden telah digulung ketika ia telah mendapat

- A polisi dan polisi yang telah diambil oleh pengarah syarikat responden dan bukan pelikuidasi. Perayu menolak liabiliti di bawah polisi tersebut atas alasan bahawa pengarah responden tidak mempunyai kuasa untuk membuat polisi insurans kebakaran dengan perayu selepas responden telah digulung, dan cuba untuk membayar balik premium insurans yang dibayar oleh responden di bawah polisi. Responden enggan menerima bayaran balik dan sebaliknya memfailkan notis usul untuk perintah penggantungan penggulangan secara kekal ('perintah penggantungan') dan untuk mengesahkan semua urusan dan perjanjian yang dibuat oleh responden dari tarikh perintah penggulangan sehingga ke tarikh perintah penggantungan. Apabila responden memperolehi perintah penggantungan, ia menyampaikan yang sama kepada perayu. Sebagai balasan, perayu telah memfailkan saman pemula memohon, antara lain, deklarasi bahawa perintah yang penggantungan telah diperolehi dalam pelanggaran s 243 (1) Akta Syarikat 1965 ('Akta') dan untuk mendapatkan suatu perintah bahawa perintah penggantungan diketepikan. Hakim Mahkamah Tinggi menolak permohonan ini dan dengan itu rayuan segera. Perayu menghujahkan bahawa ia seharusnya diberikan notis mengenai niat responden untuk memohon perintah penggantungan kerana perintah seperti itu memberi kesan kepada polisi dan pendirian yang diambil oleh perayu untuk menolak. Perayu menghujahkan bahawa perintah penggantungan perlu diketepikan kerana ia adalah pelanggaran dan ultra vires s 243(1) Akta dan di luar bidang kuasa mahkamah yang menggulungan. Hakim Mahkamah Tinggi berpendapat bahawa perbuatan mengambil polisi oleh syarikat responden atau pengarah selepas syarikat itu digulung adalah untuk manfaat syarikat dan oleh itu harus disahkan.
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Diputuskan, membenarkan rayuan dengan kos:

- (1) Kesan perintah penggantungan di bawah s 243 Akta tersebut bukan untuk membatalkan perintah penggulangan tetapi menyebabkan ia tidak berkuat kuasa dari tarikh itu apabila ia telah diberikan. Dalam kes ini, perintah penggantungan kedua-dua bahagian, adalah suatu perintah yang kekal untuk digantung sama sekali penggulangan perintah ('bahagian pertama'); dan ia adalah suatu perintah pengesahan untuk mengesahkan semua urusan dan pengaturan yang dimeterai oleh syarikat itu dari tarikh perintah penggulangan sehingga tarikh perintah penggantungan ('bahagian kedua'). Mahkamah ini tidak bersetuju dengan hakim Mahkamah Tinggi pada bahagian kedua perintah penggantungan, yang tidak berasaskan kepada mana-mana peruntukan undang-undang. Hakim Mahkamah Tinggi telah bertindak melebihi kuasa dan bidang kuasa mahkamah penggulangan apabila beliau mengeluarkan bahagian kedua perintah penggantungan. Walaupun ia boleh dihujahkan bahawa dalam memberikan perintah penggantungan di bawah s 243 (1) Akta, mahkamah boleh mengenakan apa-apa terma dan syarat yang difikirkannya patut, terma atau syarat yang dikenakan
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tidak boleh mengalahkan tujuan perintah itu sendiri. Dalam kes ini, responden melalui bahagian kedua perintah penggantungan mengesahkan polisi yang tidak sah kerana ia tidak diperolehi oleh pelikuidasi, tetapi oleh pengarah yang telah menjadi *functus officio* apabila syarikat responden telah digulung. Ini jelas bukan apa yang s 243 dijangka. Oleh itu, walaupun hakim Mahkamah Tinggi mempunyai kuasa yang sepatutnya di bawah s 243 Akta tersebut untuk memberikan penggantungan yang kekal kepada perintah penggulangan (bahagian pertama), beliau tidak mempunyai kuasa untuk mengesahkan semua urusan dan perjanjian yang dibuat oleh responden syarikat dari tarikh perintah penggulangan sehingga tarikh perintah penggantungan (bahagian kedua). Oleh itu, bahagian kedua perintah penggantungan telah diketepikan (lihat perenggan 19, 20(a), (b), 22, 25, 31, 33, 38 & 41–42).

(2) Bahagian kedua juga mempunyai kesamaran, terlalu luas dan terlalu umum (lihat perenggan 29).

(3) Mahkamah tidak bersetuju dengan syarikat responden bahawa bahagian kedua perintah penggantungan adalah sah kerana ia dibuat di bawah s 223 Akta dan K 92 KMT 1980. Ia telah diputuskan bahawa s 223 langsung tidak terpakai kepada fakta-fakta kes ini (lihat perenggan 39–40).]

Notes

For cases on claim on policy, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 114–119.

For cases on winding up in general, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1103–1825.

Cases referred to

Abric Project Management Sdn Bhd & Anor v Palmshine Plaza Sdn Bhd & Anor [2005] 1 MLJ 333, HC (refd)

Baxters Ltd, Re [1898] WN 60 (refd)

Brinds Ltd v Offshore Oil NL (No 2) (1985) 10 ACLR 232 (refd)

BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action [1996] 1 MLJ 872, HC (refd)

Intermain Properties Ltd, Re [1986] BCLC 265 (refd)

Kim Maxwell Ltd, Re [1992] 1 NZLR 69, HC (refd)

Krextile Holdings Pty Ltd v Widows [1974] VR 689 (refd)

McAusland v Deputy Commissioner of Taxation (1993) 118 ALR 577 (refd)

Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 2 MLJ 114, FC (refd)

Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd [1996] 4 MLJ 343, HC (refd)

Red Gold Mining Co, Re [1950] KB 47 (refd)

- A *Rofa Sport Management AG v DHL International (UK) Ltd* [1989] 1 WLR 902 (refd)
Shree Chamundi Mopeds Ltd v Church of South India Trust Association [1992] 3 SCC 1; AIR 1992 SC 1439 (refd)
- B *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325, SC (refd)
Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim [1997] 2 MLJ 526, CA (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)
- C *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830, CA (refd)

Legislation referred to

- Companies Act 1965 ss 223, 236, 236(1), 236(1)(a), 243, 243(1), 253
- D Companies Act 1961 [AUS] s 243(1)
Companies Act 1985 [AUS] s 383
Corporations Act 1989 [AUS] ss 482, 483
Insolvency Rules 1986 [UK] r 7.47(1)
Rules of the High Court 1980 O 92
- E **Appeal from:** Originating Summons No D-24NCC-93 of 2009 (High Court, Kuala Lumpur)
- CK Yeoh (Ranjit Singh & Yeoh) for the appellant.*
- F *Hargopal Singh (Hargopal Singh & Co) for the respondent.*

Ramly Ali JCA (delivering judgment of the court):

- G [1] This is an appeal against the decision of the learned High Court judge dated 24 February 2010 dismissing the appellant's application vide an originating summons dated 19 November 2009 to set aside the order for stay of winding up of the respondent obtained by the respondent on 27 April 2009.
- H [2] By the said originating summons, the appellant was seeking, inter alia, for a declaration that the stay order dated 27 April 2009 obtained by the respondent at the Kuala Lumpur High Court Winding Up No D1-22-86 of 2001 was obtained in breach of s 243(1) of the Companies Act 1965 and/or in excess of and/or without jurisdiction of the winding up court and is therefore null and void. As a consequence of the declaratory relief sought the appellant was seeking for an order that the said stay order dated 27 April 2009 be set aside.
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[3] The said originating summons was dismissed by the High Court on 24

February 2009. Hence the present appeal.

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FACTUAL BACKGROUND

[4] The appellant is a licensed insurance company. On 10 May 2002, the respondent obtained an insurance policy from the appellant known as a Commercial Fire Insurance Policy No 1550011620. The said fire policy was initially for a period of 10 May 2002 to 9 May 2003. It was obtained through the director or servant of the respondent. It was not obtained by the liquidator. Upon expiry of the said policy on 9 May 2003, the respondent renewed it with the appellant for a further period of 10 May 2003 to 9 May 2004.

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[5] On 4 April 2004, a fire occurred at the respondent's premises and the respondent made a claim under the said policy.

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[6] During the investigation of the respondent's claim by a loss adjuster appointed by the appellant, it was discovered that the respondent had been wound up on 23 October 2001. The appellant then repudiated the said policy vide letters dated 1 December 2004 and 13 December 2004. By reason of the repudiation the appellant attempted to refund the insurance premium paid by the respondent under the policy. The respondent refused to accept the refund and threatened to institute legal proceedings against the appellant.

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[7] Unknown to the appellant, the respondent filed a notice of motion dated 10 March 2009, and on 27 April 2009, obtained an order to stay the winding up order permanently and that all dealings and agreements entered into by the respondent from the date of the winding up (23 October 2001) till the date of the stay order (27 April 2009) be validated. The stay order was served on the appellant on or about 14 August 2009. On 19 November 2009 after obtaining and retrieving all the necessary cause papers, the appellant filed the present originating summons on 19 November 2009.

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THE APPELLANT'S ARGUMENTS

[8] The salient part of the stay order dated 27 April 2009, states as follow:

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... ADALAH DIPERINTAHKAN bahawa Perintah Penggulangan terhadap Syarikat Responden bertarikh 23hb Oktober 2001 digantung sama sekali dan bahawa segala urusan-perjanjian-perjanjian yang telah dimasuki oleh syarikat Responden dari tarikh penggulangan, iaitu 05hb Februari 2001 sehingga tarikh Perintah ini disahkan.

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[9] The appellant contended that the second limb of the stay order ie 'segala urusan-perjanjian-perjanjian yang telah dimasuki oleh syarikat

- A Responden dari tarikh permulaan penggulungan iaitu 5.2.2001 sehingga tarikh Perintah ini disahkan' amounts to an indirect complete discharge of the winding up order which the winding up court has no jurisdiction to do so. The appellant further submitted that the stay order should be set aside on the grounds that it was obtained in breach of and ultra vires s 243(1) of the Companies Act 1965; and beyond the jurisdiction of the winding up court.
- B The appellant claimed that it had no notice of the stay order until it was served on the appellant on 14 August 2009 by the respondent's solicitors. The appellant contended that the respondent should have given notice to the
- C appellant with regards of intention to obtain such order as the said stay order affects the fire policy and the position taken by the appellant to repudiate it. The appellant further contended that the residual powers of the respondent's directors after it was wound up is only to bring an appeal in the name of the company against the winding up order; and the directors had no power to enter
- D into a fire insurance policy with the appellant.

THE RESPONDENT'S ARGUMENTS

- E [10] The respondent on the other hand argued that the stay order in question was granted within the jurisdiction of the court and no injustice has been caused to any creditor, shareholder or the public. That being so, it should remain undisturbed. To the respondent, the only purpose of the appellant's application in the present case is to evade its liability under the fire insurance
- F policy.

- G [11] The respondent further submitted that the court has the jurisdiction to validate all dealings and agreements entered into after the commencement of winding up of the company and to grant a perpetual stay. The respondent agreed with and supported the findings of the learned judge that 'the said order cannot be said to be in excess of jurisdiction as it is a necessary order to ensure that all transactions after the winding up process has commenced are duly validated, failing which, all steps taken in the course of the winding up
- H proceedings will be a subject of challenge'.

DECISION OF THE HIGH COURT JUDGE

- I [12] The learned High Court judge noted that the appellant in making the application was to evade liability in respect of the fire policy. He further held that just because a company had been wound up does not mean any of the transaction during the material time or after the winding up cannot be sustained; it depends on whether the act was for the benefit of the company which was essential in the process of winding up. In the present case, the judge

held that the act of taking a fire insurance policy by the company or its directors after the company was wound up was for the benefit of the company and therefore must be validated.

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[13] The learned judge also held that the stay order was made within the power and jurisdiction of the winding up court; and the second limb of the said order cannot be said to be in excess of jurisdiction as it is a necessary order to ensure that all transactions after the winding up process has commenced are duly validated, failing which all steps taken in the course of winding up proceedings would be subject to challenge. The judge was of the view that the terms of the stay order are one essential within the parameters of the company's transactions.

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FINDINGS OF THIS COURT

[14] Under s 243(1) of the Companies Act 1965, the court is empowered at any time after an order for winding up has been made, on the application of the liquidator, or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stay, to make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit.

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[15] Under the said s 243(1), the court has no power to set aside, discharge or rescinds the winding up order, but only to stay the winding up order either altogether or for a limited time upon terms the court thinks fit. 'Stay' must be distinguished from 'setting aside', 'discharge' or 'rescind'. A winding up order could not be discharged or rescinded after it had been made. The only remedy is to apply for stay of the proceedings (see *Re Baxters Ltd* [1898] WN 60; *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830 (CA); *Brinds Ltd v Offshore Oil NL (No 2)* (1985) 10 ACLR 232; and Ford, *Principles of Company Law*, (5th Ed), 1990, para 2207 at p 770).

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[16] In 2 *Jowitt's Dictionary of English Law*, (2nd Ed) at pp 1701–1702, 'stay' can mean 'a total discontinuance of an action ... but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action cannot be dismissed, because the court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment'.

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[17] The Companies Act 1965 and the Companies (Winding-Up) Rules 1972 make no express provision enabling the court to set aside, or discharge or rescind a winding up order after it has been made and perfected. The scheme of the Act and the Rules is such that an aggrieved party may appeal against the winding up order under s 253 of the Act, or apply to stay the proceedings under

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A s 243 of the Act either altogether or for a limited time under terms and conditions which the court thinks fit (see *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325; *Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd* [1996] 4 MLJ 343 and *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449).

B [18] A stay order under s 243 of the Companies Act 1965 takes effect from date of pronouncement of the stay and not from the date of the winding up order. Therefore a stay does not wipe the winding up order from existence but would only operative from the date of the passing of the stay order.

C [19] The effect of an order staying winding up proceedings is that the winding up order becomes inoperative without being revoked (see *Krextile Holdings Pty Ltd v Widows* [1974] VR 689 at p 694). Proceedings are not ended by a stay though nothing can be done to pursue them without further court order (see *Rofa Sport Management AG v DHL International (UK) Ltd* [1989] 1 WLR 902). Tipping J, in *Re Kim Maxwell Ltd* [1992] 1 NZLR 69 once said that ‘a permanent stay amounts in reality to a contradiction in terms: the winding up remains but is permanently stayed’. In other words, the effect of a stay order is that the winding up process comes to an end — the whole effect of the winding up ceases and the company can thereafter resumes the conduct of its business and affairs as if no winding up order existed (see *Krextile Holdings Pty Ltd v Widows*; *The Law of Company Liquidation*, (4th Ed) by Andrew R Keay).

F [20] In the present case, the stay order dated 27 April 2009 granted by the learned High Court judge has two limbs, namely:

- (a) perpetual order to stay altogether the winding up order made on 23 October 2001 (the first limb); and
- G (b) validation order to validate all dealings and agreements entered into by the company from the date of the winding up order (23 October 2001) until the date of the stay order (27 April 2009) (the second limb).

H [21] The learned judge held that just because a company had been wound up does not mean any of the transaction during the material time or after the winding up cannot be sustained ... it depends on whether the act is for the benefit of the company which is essential in the process of winding up. In this case, the learned judge held that the act of taking a fire insurance policy by the company or directors after the company was wound up is for the benefit of the company.

I [22] This court cannot agree with the learned judge on this issue ie the second limb of the stay order. The Companies Act 1965 or the Companies

(Winding-Up) Rules 1972 make no express provision enabling the court to make such an order. In *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 2 MLJ 114, the company had been ordered to be wound up on a contributory's petition. About 18 months after the winding up order was made, all members realised that the break up of the valuable assets of the company was a financial disaster for them and they asked for a stay of proceedings and for reversal of the liquidators sales which were made during the winding up process and had nearly been completed. Abdoolcader J refused to interfere with the liquidator's sale because this would be a breach of commercial morality and refused to order stay of winding up proceedings as requested.

[23] There are strings of authorities to show that a stay order takes effect from the date of pronouncement of the order and not backdated to the date of the winding up order. A stay order does not wipe the winding up order out of existence but would only be operative from the date of the granting of the stay order. Therefore the question of validating all dealings and agreements entered into after the date of the winding up until the date of the stay order (as being done be the learned judge in the present case and described by Abdoolcader J as against the principles of commercial morality) does not arise at all (see *Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors*; *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action* [1996] 1 MLJ 872; *Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd*; *Mookapillai & Anor v Liquidator, Sri Saringgit Sdn Bhd & Ors*; *McAusland v Deputy Commissioner of Taxation* (1993) 118 ALR 577).

[24] During the winding up process ie from the date of the winding up order until the date of the stay order, the affairs of the company were in the hands of the liquidator properly appointed by the court in accordance with the powers conferred by the Companies Act 1965 (particularly s 236 of the Act).

[25] It is trite law that once a company is wound up, the board of directors of the company becomes functus officio. The liquidator displaces the directors and the control of the activities of the company is vested with the liquidator. No one but the liquidator can act for the company. The directors however have the residual powers to bring an appeal against the winding up order (see *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325; *Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim* [1997] 2 MLJ 526; *Abric Project Management Sdn Bhd & Anor v Palmshine Plaza Sdn Bhd & Anor* [2005] 1 MLJ 333).

[26] When a winding up order is made, the directors of the company remain in office but their powers are removed. While the company is in the process of being wound up a person cannot perform or exercise, and must not purport to

- A perform or exercise a function or power as an officer (other than a liquidator) of the company, except with the approval of the liquidator or the court.

- B [27] The learned judge made the second limb of the stay order, validating all dealings and agreements entered into prior to the stay order on the ground that those dealings and agreements are acts for the benefit of the company which are essential in the process of the winding up. The learned judge further ruled that the second limb of the stay order cannot be said to be in excess of jurisdiction as it is necessary to ensure that all transactions after the winding up process has commenced to be duly validated failing which all steps taken in the course of winding up proceedings would be subject matter of challenge.

- D [28] Unfortunately, the learned judge failed to point out under what provision of law or the relevant Act/Rules the said second limb was made. The nearest we can find is s 236(1)(a) of the Companies Act 1965 which provides 'The liquidator may with the authority either of the court or of the committee of inspection — carry on the business of the company so far as is necessary for the beneficial winding up of the company'.

- E [29] The second limb of the stay order is ambiguous, too wide and too general. It covers 'all dealings and agreements entered into by the Respondent from the date of the winding up until the date of the stay order'. The court is in no position to be satisfied what the particulars of the dealings and agreements are; whether they are really 'necessary for the beneficial winding up of the company'.

- G [30] It must also be noted the power to carry on such a business under s 236(1) of the Companies Act 1965 can only be performed and exercised by the liquidator with the authority either of the court or of the committee of inspection, not anyone else, not even the board of directors of the company.

- H [31] It may be argued that in granting the stay order under s 243(1) of the Act, the court may impose terms and conditions as it thinks fit. But it must be stressed here that any term and condition imposed must not defeat the purpose of the order itself. If the validation of all previous dealings and agreements is against the universal spirit of a winding up order and cannot be allowed under the section, then the court cannot impose any term and condition to the same effect under the same section, which may in effect defeat the purpose of the said section.

- I [32] In effect, the second limb of the stay order has the effect of rescinding or discharging totally the winding up order perpetually, as if the winding up order has never been made at all right from the beginning. Without enabling

provision to that effect, the second limb of the order cannot be allowed to stand as the effect on commercial reality is adversely far reaching.

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[33] In the present case, the respondent has through the second limb of the stay order validated the fire insurance policy which is void as the policy was not obtained by the liquidator, but by the directors. This is clearly not what s 243 envisaged.

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[34] In the United Kingdom, the position is different. Until the Insolvency Rules 1986 came into force, a winding up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay. The Insolvency Rules 1986 (r 7.47(1)) which came into force in 1986 changed the position. It provides that 'every court having jurisdiction under the Act (Insolvency Act 1986) to wind up companies may review or vary an order made by it in the exercise of that provision' (see *Re Intermain Properties Ltd* [1986] BCLC 265). Thus after 1986, the court in the United Kingdom is empowered to vary, review, set aside, discharge or rescind a winding up order and to validate all transactions entered into the company after the winding up proceedings has commenced. There is no such rule of practice or statutory provision in Malaysia which is equivalent to the UK r 7.47(1) of the Insolvency Rules 1986.

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[35] In Australia, the position is the same as in Malaysia. The relevant provisions of the Australian laws are s 243(1) of the Companies Act 1961; s 383 of the Companies Act 1985; and ss 482–483 of the Corporations Act 1989. The effect of the relevant provisions in Australia is that once a winding up order has been made, its descent into dissolution will be prevented only in the unusual event of the court ordering, either an indefinite stay of the winding up proceedings or termination of the winding up. The court has inherent jurisdiction to grant a stay but not to validate transactions entered into prior to the stay order (see *Brinds Ltd v Offshore Oil LN (No 2)* and *Ford Principles of Company Law*, (5th Ed), 1990, para 2207 at p 770).

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[36] In India, the position is the same. In *Shree Chamundi Mopeds Ltd v Church of South India Trust Association* [1992] 3 SCC 1; AIR 1992 SC 1439 it was held to the effect that the stay operation of a winding up order means that the winding up order which has been stayed would not be operative from the date of the passing of the stay order; and it does not mean that the said winding up order has been wiped out from existence.

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[37] In Canada, it has been held that the court has no power to reverse anything done in the liquidation process up to the time of the stay. (See *Re Red Gold Mining Co* [1950] QB 47).

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[38] On that ground, this court agrees with learned counsel for the appellant

A that such an order (the second limb) was not based on any provision of law and the learned judge had acted in excess of the powers and jurisdiction of the winding up court; and must be set aside by this court.

B [39] The respondent argued that the application for the validation order (the second limb) of the stay order was made under s 223 of the Companies Act 1965 and O 92 of the Rules of the High Court 1980. The respondent contended, that the said s 223 does not state that all acts done by the company or its directors on behalf of the company after the commencement of winding up are void; instead the section is intended to give powers to the court to
C validate transactions or dispositions made including payment for contracts made after the commencement of winding up.

D [40] With respect, this court cannot agree with the respondent on this point. Section 223 is totally not applicable to the fact of the present case. It deals with the issue on the avoidance of disposition of property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court. It does not specifically deal with 'dealings and agreements entered
E into by the company after the winding up has commenced'.

CONCLUSION

F [41] On the above considerations the court finds that the learned High Court judge had erred in making the second limb of the stay order (dated 27 April 2009) which has the effect of totally rescinding or discharging the winding up order perpetually against the contemplation of s 243 of the Companies Act 1965. We agree that the learned judge has the necessary powers under s 243 of the Companies Act 1965 to grant a perpetual stay order of the
G winding up, but not the power to validate all dealings and agreements entered into by the company from the date of the winding up order until the date of the stay order.

H [42] We therefore unanimously allow the appeal with costs of RM10,000 to the appellant. We affirmed the first limb of the stay order, but set aside the second limb of the said order.

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Appeal allowed with costs.

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Reported by Kohila Nesan

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